(2)

99-1340

No.

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AUBREY WHELCHEL,

Petitioner

v.

CITY OF COVINGTON, GEORGIA,
CITY COUNSEL OF COVINGTON,
JIM BERRY, JOHN M. OTT, in his official capacity,
SUPERIOR COURT OF NEWTON COUNTY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

RESPONDENTS CITY OF COVINGTON, GEORGIA, CITY COUNCIL OF COVINGTON, AND SUPERIOR COURT OF NEWTON COUNTY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(As identified by Petitioner)

I. Whether the Rooker-Feldman Doctrine is applicable to the facts of the case and issues raised and controlling.

II. Whether inverse condemnation statutes are applicable statutory alternative avenues for relief which invalidates a party's statutory rights to relief under Title 42 U.S.C. § 1983, against individual actors.

III. Whether the Rooker-Feldman doctrine invalidates relief under the rights granted by Pulliam v. Allen.

PARTIES TO THE PROCEEDING

Aubrey Whelchel	Plaintiff/Petitioner
City of Covington, Georgia	Defendant/Respondent
City Council of Covington	Defendant/Respondent
John M. Ott, Superior Court Judge	Defendant/Respondent
Superior Court of Newton County	Defendant/Respondent
Jim Berry	Defendant/Respondent

OPINIONS BELOW

Whelchel v. City of Covington, et al., Order, United States District Court for the Northern District of Georgia, Judge Carnes, October 20, 1998. (Dismissing Petitioner's civil rights complaint.)

Whelchel v. City of Covington, et al., (not published) Opinion of the Eleventh Circuit Court of Appeals, September 10, 1999. (Affirming decision of district court.)

Whelchel v. City of Covington, et al., (not published) Opinion of the Eleventh Circuit Court of Appeals, October 29, 1999. (denying Petition for Rehearing.)

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on September 10, 1999. The Court of Appeals denied a timely filed petition for rehearing on October 29, 1999.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
(As identified by Petitioner)

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of greivances.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Unites States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

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STATEMENT OF THE CASE

Whelchel owns property located at 4132 and 4134 Turner Street in Covington, Georgia.[1] (R-1-2). During the course of his ownership of the property, the city passed ordinances and codes concerning housing within the city. (R-1-2). The City, through the Building and Zoning Department ("Department"), inspected Whelchel's houses and determined that the houses did not meet building codes. The Department served a letter on Whelchel concerning the violations. (R-1-2). After receiving the letter, Whelchel appeared in front of the Building and Zoning Board ("Board") and advised the Board that he was making improvements to the houses. (R-1-2, 3). The Board issued a building permit to allow Whelchel to commence making repairs and renovations to the property to bring the houses up to the code requirements. (R-1-3).

Jim Berry ("Berry"), a housing inspector for the Board, monitored Whelchel's repairs on the property. In April of 1996, Whelchel requested that Berry inspect the property, notifying him that Whelchel planned to paint and improve the outside of the homes to bring the houses up to code. (R-1-3). Berry inspected the premises and issued a "Sworn Complaint of Violation of the City of Covington's Code of Ordinances" based upon section 301.1 of the city code. (R-1-3). Whelchel alleges that the complaint failed to state with specificity the

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[1] This recitation of facts comes verbatim from N.D. Ga. Judge Carnes' depiction of same. The allegations of fact were taken as true for purposes of the Eleventh Circuit's review of the trial court's grant of these Respondents' Motion to Dismiss.

basis of the complaint to adequate enable Whelchel to tender an answer. (R-1-3).

On April 24, 1996, and May 22, 1996, the Municipal Court of the City of Covington, Chief Judge Jerry O. Capes, heard the matter and issued an order finding that: (a) the premises and property constituted a nuisance as contemplated under Section 1-123(d) of the code and (b) Whelchel has failed to abate the nuisance. (R-1-3, 4). The matter was transferred to the City Council of the City of Covington ("City Council") for further consideration. (R-1-4).

On June 3, 1996, Whelchel appeared before the City Council and challenged the accuracy of evidence offered by Berry in the court proceeding. (R-1-4). On the same date, the City Council placed into the formal record of the proceedings that Judge Capes was to amend his order to include a finding "[t]hat it was the opinion of the Court that the cost of repairs, alteration, and/or improvements needed in order to meet the minimum requirements of the Code of Ordinances for the City of Covington of the two structures will exceed one-half of the value of the two houses when repaired to satisfy the minimum requirements of the Code of Ordinances of the City of Covington." (R-1-4). On June 4, 1996, Judge Capes issued the amendment. (R-1-4).

On July 3, 1996, Whelchel tendered a handwritten appeal to the Superior Court of Newton County within thirty days of the judgment by the City Council. (R-1-5). Before the Newton County Court considered the appeal, on August 28, 1996, the City of Covington entered

Whelchel's property and destroyed the two homes. (R-1-5). On July 21, 1997, Judge Ott dismissed the appeal. The order of dismissal was entered on July 22, 1997. (R-1-5).

ARGUMENT

I. Introduction

The Eleventh Circuit correctly decided that Petitioner's federal civil rights claims, brought following his loss of a zoning issue in state Superior Court, is barred by the Rooker-Feldman doctrine. Petitioner's pursuit of claims in federal court necessarily call into question the judgment of the state Superior Court on the zoning issue, and the issues involved in Petitioner's federal claims are inextricably intertwined with the state court ruling. Adequate state court remedies also exist to redress Petitioner's concerns. For these reasons, Petitioner's Petition for Writ of Certiorari should be denied.

II. The Rooker-Feldman doctrine is controlling in the instant case, and bars Petitioner's claims from federal court.

The relief Petitioner sought from the Northern District of Georgia would have necessitated a review of the Newton County Superior Court's final judgment. In support of his federal civil rights suit, Petitioner alleged in his Complaint that Superior Court Judge Ott

did "dismiss Plaintiff's appeal so as to deprive Plaintiff of such constitutional rights." Petitioner's District Court Complaint, Count 3, ¶ 5. One can scarcely deny that Petitioner called upon the federal district court, a court of original jurisdiction, to review the judgment of the Superior Court.

A federal district court lacks subject matter jurisdiction to review the decision of a state superior court. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483, 103 S. Ct. 1303, 1316 (1983) ("a United States District Court has no authority to review final judgments of a state court in judicial proceedings."). The Rooker-Feldman reasoning is two-fold. First, district courts are courts of original jurisdiction (28 U.S.C. § 1331). See Powell v. Powell, 80 F. 3d 464, 466 (11th Cir. 1996) and Rooker v. Fidelity Trust Co., 263, U.S. 413, 416, 44 S. Ct. 149, 150 (1923) ("jurisdiction possessed by the District Courts is strictly original."). For the District Court to review a decision of a state court in Petitioner's case would be an attempt to exercise appellate jurisdiction. Second, the statutory scheme is such that these types of cases should first go to the "highest court of a State in which a decision could be had," and then should be appealed to the United States Supreme Court. See 28 U.S.C. § 1257. Neither occurred here.

In addition to barring claims that directly review state court decisions, the Rooker-Feldman doctrine also bars claims that are "inextricably intertwined" with the state court judgment. See Feldman, 460 U.S. at 482 n. 16, 103 S. Ct. at 1315 n. 16. Whether the exact claim

raised in federal court was also raised in state court is immaterial as long as the federal claim is "inextricably intertwined" with the state court's judgment. See Powell v. Powell, 80 F. 3d 464, 466 (11th Cir. 1996). Review of a federal court claim that is sufficiently intertwined with the issues decided in state court serves as a form of appellate review. See Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225, 1229 n. 7 (11th Cir. 1999) quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 107 S. Ct. 1519, 1533 (1987) (Marshall, J., concurring) ("A federal claim is intertwined with the state court judgment 'if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'").

If the federal district court were to assume jurisdiction over this matter not even appealed to the Georgia Supreme Court and then find in favor of Petitioner, that court would have to conclude that the state court wrongly decided his case. It is the decision itself which Petitioner has alleged violated his constitutional rights. Additional, inextricably intertwined claims were also presented by Petitioner to the district court. These included takings and due process claims. Federal court review of these claims would necessarily require inspecting the same evidence presented to the Municipal Court in consideration of the zoning issue. Claims related to the destruction of the actual houses are legally equivalent to claims challenging the zoning violations judgment and dismissal of the appeal of that judgment. The houses were destroyed as a procedural result of the zoning violations.

Regardless of the "destruction" issue, the lower court decision was never appealed all the way up the Georgia appellate chain. Only if Petitioner had been denied relief by the Georgia Supreme Court could a federal court exercise subject matter jurisdiction over the claims presented in this action. As the Eleventh Circuit correctly decided that the district court was without subject matter jurisdiction to hear Petitioner's claims, Petitioner's petition for writ of certiorari to this Honorable Court should be denied.

III. As avenues of relief were available to Petitioner under state law, his 42 U.S.C. § 1983 claims are not cognizable.

Petitioner presented a Fifth Amendment takings claim to the District Court based on the City's condemnation of two of his buildings. The district court correctly dismissed this claim as not ripe for adjudication. Whelchel v. City of Covington, et al., Order, United States District Court for the Northern District of Georgia, Judge Carnes, October 20, 1998. The district court's reasoning is well phrased by the Eleventh Circuit in Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225, 1229 n.8 (11th Cir. 1999), addressing a claim that revocation of a zoning permit was an unconstitutional taking. The court in Agripost ruled that "if the state has established a process for obtaining compensation, the property owner cannot prosecute a takings claim under the Fifth and Fourteenth Amendments unless he alleges that the

state process is inadequate." Id., citing Williamson County Regional Planning Commission v. Hamilton Bank,473 U.S. 172, 194, 105 S. Ct. 3108, 3120-22 (1985). The Eleventh Circuit affirmed the district court's decision dismissing Agripost's takings claim on ripeness, for failure to pursue the state's inverse condemnation remedy. Id. at 1230.

In the instant case, Petitioner failed to pursue any of the numerous avenues available to him under Georgia law. As explained to the Eleventh Circuit, the most apparent available claim was on for the taking of property without just compensation. See Ga. Const. Art. I, § III, ¶ I and Bickerstaff Clay Production Co. v. Harris County, Georgia, 89 F.3d 1481 (11th Cir. 1996). Similarly, Petitioner could have claimed Respondents inversely condemned his property. As Whelchel has not availed himself of available avenues under Georgia law, his Fifth Amendment claim was properly dismissed, and the Petition for Writ of Certiorari should be denied.

IV. Petitioner's claims are barred by the Rooker-Feldman doctrine, notwithstanding Pulliam v. Allen.

Petitioner's Pulliam v. Allen arguments regarding judicial immunity apply primarily to Judge Ott, who is not represented by these Respondents. However, the argument still fails to warrant a grant of Petition for Writ of Certiorari. Petitioner has asked this Court for "clarification of the Pulliam decision" and its interplay with the Rooker-

Feldman doctrine. The facts of the case at bar do not warrant such an exploration. The case of Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970 (1984), addressed whether judicial immunity is a bar to prospective injunctive relief against a judge and the award of attorney fees in such a case. The Rooker-Feldman doctrine addresses subject matter jurisdiction of a federal court when a plaintiff's 42 U.S C. § 1983 claim may collaterally review a state court decision. In the present case, Petitioner fails on both accounts.

Petitioner's claims against Judge Ott and the Superior Court of Newton County allege a single, past incident. The district court found this insufficient to state a claim for injunctive relief. Whelchel v. City of Covington, et al., Order, United States District Court for the Northern District of Georgia, Judge Carnes, October 20, 1998. As injunctive relief could not be supported, Pulliam became inapplicable. Id. Petitioner's claims are also barred by the Rooker Feldman doctrine, as set forth above and by the Eleventh Circuit. See Whelchel v. City of Covington, et al., (not published) Opinion of the Eleventh Circuit Court of Appeals, September 10, 1999.

V. CONCLUSION

Petitioner's claims of constitutional violation stem from the judgments of state courts in his zoning dispute with the City. Review of those constitutional claims would not only touch upon the state judgments, but directly review the state decisions and issues inextricably

intertwined with them. Petitioner's claims are properly brought before a state court of appellate jurisdiction, as they involve the propriety of the application of state zoning and inverse condemnation laws in his case. Under the Rooker-Feldman doctrine, the federal district court is without jurisdiction to hear Petitioner's claims, and under Williamson County Regional Planning Commission v. Hamilton Bank, Petitioner's takings claims are barred for want of ripeness.

WHEREFORE, Respondents respectfully request this Court DENY Petitioner's petition for writ of certiorari.

This 8th day of March, 2000.

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